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No. 44

In the Supreme Court of the United States

OCTOBER TERM 1968

WILLIAM SKINNER, AUGUST R. GUELDNER, AND ALTON J. CHARBONNET,

Petitioners,

v.

STATE OF LOUISIANA,

Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana To Review State of Louisiana vs. William Skinner, et al., No. 48,455 on the Docket of that Court

BRIEF ON BEHALF OF THE STATE OF LOUISIANA, RESPONDENT

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SUBJECT INDEX

	PAGE
Statement of the Case	1
Argument	4
1. The Absence of Charbonnet From The Hearing of Skinner's and Gueldner's Preliminary Motions	4
A. Standing To Raise	4
B. Charbonnet's Rights Were Not Infringed	6
2. No Prejudice to the Accused Resulted Because the Trial Lasted Until 2:45 A.M. the First Day	17
3. The Judge's Charge to the Jury on the Law of Conspiracy Was Correct	27
A. The Louisiana Law of Conspiracy	29
B. The Instant Case	30
C. Second-Crack Doctrine	33
Conclusion	45

TABLE OF AUTHORITIES

Cases

Carbo v. United States, 314 F.2d 718, cert. denied 377 U.S. 494 ..... 36, 39

Conn. Mutual Life Ins. Co. v. Hillman, 188 U.S. 208 35

Crowe v. United States, 200 F.2d 526 14

Day v. State, 123 Tex.Crim. 9, 57 S.W.2d 581 21

DiCarlo v. United States, 6 F.2d 364, 367 41

PAGE

Duncan v. Louisiana, U.S. 36
Evans v. United States, 384 F.2d 393 14
Ford v. United States, 273 U.S. 593, 605 34
Gila Valley Ry. Co. v. Hall, 232 U.S. 94 36
Glasser v. United States, 315 U.S. 60 4
Glouser v. United States, 296 F.2d 853 14
Hoffa v. United States, 385 F.2d 201, aff'd 341 U.S. 494 40
Jackson v. Denno, 378 U.S. 368 40
Jones v. United States, 299 F.2d 661 14
Lewis v. State, 125 Tex.Crim. 66, 65 S.W.2 771 21
Logan v. United States, 144 U.S. 263 35
Maher v. State, 144 Neb. 463, 13 N.W.2d 641, cert. denied, 323 U.S. 757, 65 S.Ct., 91, 89 L.Ed. 606 21
Mende v. United States, 282 F.2d 881 20
People v. Talbot, 65 Cal.App.2d 654, 151 P.2d 317 38
Pointer v. Texas, 380 U.S. 400 ..... 10, 15
State v. Basco, 216 La. 365, 43 So.2d 761 13
State v. Brasseaux, 163 La. 686, 112 So. 6501 32
State v. Capaci, 179 La. 462, 154 So. 419 32
State v. Fahey, 35 La.Ann. 9 13
State v. Fletcher, 236 La. 40, 106 So.2d 709 33
State v. Forsyth, 229 La. 690, 86 So.2d 536 20
State v. Ganey, 246 La. 986, 169 So.2d 73 20
State v. Gebbia, 121 La. 1083, 47 So. 32 32
State v. Gunter, 180 La. 145, 156 So. 203 32
State v. Gunter, 208 La. 694, 23 So.2d 305 33
State v. Jones, 233 La. 775, 98 So.2d 185 20
State v. Skinner, 251 La. 300, 204 So.2d 370 3
State v. Lee, 127 La. 1077, 54 So. 356 36

PAGE

State v. Melerine, 236 La. 929, 109 So.2d 471 ....31, 32
State v. Pierre, 39 La.Ann. 9, 3 So. 60 13
State v. Robichaux, 165 La. 497, 115 So. 728 31
State v. Taylor, 173 La. 1002, 139 So. 325 32
State v. Terrell, 175 La. 758, 144 So. 488 .....31, 32
Sherman v. United States, 356 U.S. 369 9
Snyder v. Massachusetts, 291 U.S. 97 13
Steele v. United States, 267, U.S. 505 42
United States v. Dennis, 183 F.2d 201, aff'd, 341 U.S. 494 40
United States v. Hoffa, 349 F.2d 20 39

Texts

Am.Jur. (vol 14) 898, 899, secs. 180, 190 13
Am.Jur., Trial (vol 53) sec. 673, p. 519 33
Anno: *Continuance—Counsel—Illness or Death*, 66 A.L.R.2d 267, 275-279 (1959) 21
Barnhart, *The Determination of Facts Preliminary to Admission of Evidence in the Arkansas Courts*, 2 Ark.L.Rev. 1 (1947) 34
Bennett, *The Louisiana Criminal Code*, 5 La.L.Rev. 6 (1942) 29
C.J.S., Criminal Law (23a), sec. 1278, p. 692 33
Conrad, Modern Trial Evidence, (vol 2) 352 (1956) 34
Conspiracy Not Charged, 66 A.L.R. 1311, 1314 (1935) 33
Evidence-Province of Judge and Jury in Determining Preliminary Questions of Fact in New York, 23 N.Y.U.L.Q.Rev. 472 (1948) 34
Fisch, New York Evidence, § 26 (1959) 34

PAGE

Maguire and Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 Harv.L.Rev. 392 (1926) 33

Maguire, Evidence: Common Sense and Common Law, 217, 219-220 (1947) 36, 38

Maguire, *Preliminary Findings of Fact*, in Evidence: Common Sense and Common Law, 211-231 (1947) 34

Marr's Criminal Jurisprudence of Louisiana, vol. 2, p. 848, (2d ed. 1929) 32

McCormick, *Preliminary Questions of Fact Arising on Objections*, in Evidence, 122-126 (1954) 34

Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 Harv.L.Rev. 165, 177. (1929) 33, 37, 38

Morgan, *The Law of Evidence, 1941-1945*, 59 Harv.L.Rev. 481, 488-495 (1946) 34

Role of Judge Where Preliminary Question of Competency Coincides With Ultimate Issue, 20 U.Chi.L.Rev. 313, 318, n. 30 (1953) 34, 36

Wharton's Criminal Law and Procedure:

(vol. 1) 171-221, Ch. 7, pp. 194-198 (Anderson, 1957) 28

(vol. 4) 591, n. 12 (Anderson, 1957) 31

(vol. 5) 141, sec. 2005 (Anderson, 1957) 13

Wigmore, Evidence (vol. 9) . 501-503 (3d. 1940) 34, 37

Statutes

Articles 154-155 La. Code Crim. Proc. (1928) 9

Article 320 La. Code Crim. Proc. 19

Article 385 La. Code Crim. Proc. (1928) 32

	PAGE
Article 493 La. Code Crim. Proc.	29
Articles 831-834 La. Code Crim. Proc.	13
La. Revised Statute 14:26	29
La. Revised Statute 15:455	31
La. Revised Statute 40:962	3
Fed.R.Crim., P. 8, 14	30

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BRIEF ON BEHALF OF THE STATE OF LOUISIANA, RESPONDENT

STATEMENT OF THE CASE

On May 21, 1965 Benjamin Fullington, an undercover agent with the Louisiana State Police, went to Skinner's Motor Mart, 2101 Canal Street in New Orleans, and told William Skinner, owner of the mart, and August Gueldner, a car salesman, two of the accused herein, that he was looking for a contact from whom he could buy marijuana. Either Gueldner or Skinner made a phone call, after which Fullington was informed that the pusher (seller) would be at the lot that afternoon. The agent left and returned around 8 in the evening, at which time Skinner introduced

Fullington to Alton Charbonnet, alias Joe Jackson, the third accused in this proceeding. Charbonnet told the agent that the stuff (marijuana) was under the seat of a white 1960 Lincoln parked on the lot, whereupon Fullington paid Charbonnet $20, went to the car indicated, and found under the front seat a matchbox filled with marijuana.[1] R. 419-487.

A week later, on May 28, 1965, Gueldner telephoned Sergeant Russell Hebert, a member of the Louisiana State Police who was working on the case as an undercover agent with Fullington. Gueldner told Hebert that the "connection" that was going to sell him marijuana was at Skinner's Motor Mart. When Hebert arrived at the lot Gueldner and Charbonnet were there, and in an empty office Charbonnet sold the agent 9 marijuana cigarettes. R. 488-489, 574-576. Also at this time Charbonnet, at Hebert's request, agreed to get some heroin for the agent. R. 577-580.

On July 30, 1965 Skinner, Gueldner and Charbonnet were arrested, R. 492-493, and shortly thereafter all three were jointly charged in the first count of a bill of information with selling marijuana to Ben Fullington on May 21, 1965, and in a second count with

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[1]On p. 23 of their brief in support of their Petition for Certiorari petitioners cite as proof of Mr. Gill's "illness and exhaustion" at the trial the fact that he "had failed to call a key witness for the defense, a party who was to testify as to the true ownership of the automobile in which the marijuana was allegedly found." The ownership of the car parked in the lot in which Charbonnet momentarily hid the marijuana was clearly irrelevant, which is obviously why defense counsel did not bother calling a witness to testify on this point.

unlawfully possessing marijuana on that date. R. 22-23; see La. R.S. 40:962.

The accused pleaded not guilty, were tried, and were found guilty as charged on both counts. They appealed to the Louisiana Supreme Court. Although thirty-five bills of exception were reserved and perfected in the trial court, the accused relied in the Louisiana Supreme Court on six "specifications of error", involving bills numbers 6, 18, 19, 21, 23, 24, 29 and 35. On original hearing the Louisiana Supreme Court completely ignored the established jurisprudence of Louisiana and other jurisdictions and set aside the convictions and sentences herein on the ground that bill of exception number 29 was meritorious because the trial judge erred in charging the jury on the law of conspiracy. See *State v. Skinner*, 251 La. 300, 204 So.2d 370, particularly dissents of Sanders and Hawthorne, JJ., at 204 So.2d 377-380.

On application of the State of Louisiana a rehearing was granted and the convictions and sentences of Skinner, Gueldner and Charbonnet were affirmed. See 204 So.2d 380-394.

Thereafter Skinner, Gueldner and Charbonnet applied to this Honorable Court for a Writ of Certiorari to review the decision of the Louisiana Supreme Court in this matter on rehearing, relying in their Petition for Certiorari on three allegations of error involving bill of exception number 35 (which involves the absence of Charbonnet from the hearing of Skinner's and Gueldner's Preliminary Motions); bill of exception number 29 (which involves the judge's charge to the

jury on the law of conspiracy); and bill of exception number 23 (which involves the refusal of the trial judge to grant a continuance, or recess, at 11:40 p.m. on the first day of the two day trial).

ARGUMENT

1. The Absence of Charbonnet From the Hearing of Skinner's and Gueldner's Preliminary Motions

This allegation of error involves bill of exception number 35, which was reserved by Alton Charbonnet when the trial judge overruled his Motion for a New Trial, in which he complained for the first time about his absence from the hearing of his coaccused's preliminary motions. R. 108, 388-390.

A. Standing To Raise

This particular allegation of error can obviously be urged only by Charbonnet, as Skinner and Gueldner can claim no possible prejudice to themselves arising from the absence of Charbonnet at the hearing of their pre-trial motions. See *Glasser v. United States*, 315 U.S. 60, 76-77 (1942). Skinner and Gueldner could have objected to Charbonnet's absence and refused to proceed without him; surely they could have subpoenaed Charbonnet, who had been unable to make bond, to appear at these hearings had they so wanted, or at least have served him with a copy of their pleadings. But Skinner and Gueldner clearly did not want Charbonnet to be present at these hearings because at this early stage of the proceedings Skinner and Gueldner were trying to disassociate themselves completely

from Charbonnet, who was the one who had told the undercover agent that the marijuana was under the seat of a car parked on Skinner's lot and who was paid $20 by the agent for the "stuff". See R. 42-64, esp. R. 62. Apparently Skinner's and Gueldner's only hope as they viewed the matter prior to their trial and conviction, was to repudiate Charbonnet, the most active member of the trio. After conviction, of course, they completely reversed themselves and are now seeking a new trial on this ground.

In brief filed in this Court Skinner and Gueldner maintain that *they* were prejudicted by Charbonnet's absence from the October 8, 1965 Preliminary Hearing because they were deprived "of the benefit of having Charbonnet present to hear what was being said by the State witnesses". Petitioner's brief, p. 9. Then in a vain attempt to show prejudice Skinner and Gueldner erroneously contend that "at one stage in the taking of testimony during said pre-trial hearings, the State had put forth erroneous evidence as to the identity of the undercover agent involved in a most vital part of the case. Agent Hebert was confused with agent Fullington." Brief, p. 10. It is then argued that if Charbonnet had been present at the Preliminary Hearing the defense might somehow have capitalized on this imaginary error. Brief, pp. 11-12.

The foregoing argument is simply a product of defense counsel's fertile imagination and the facts alleged therein are squarely at variance with the record in this case.

Although as originally drafted *the bill of informa-*

tion herein charging Skinner, Gueldner and Charbonnet with sale and possession of marijuana on May 21, 1965 erroneously recited that May 21 sale of marijuana was made to Russell Hebert, approximately a month before trial the State of Louisiana with permission of the court amended this bill of information to correctly recite that the May 21 sale of marijuana was made to Ben Fullington. See R. 6, 22. However, there was nothing erroneous or confusing about the testimony which Fullington and Hebert gave at Skinner's and Gueldner's Preliminary Hearing. On the contrary, at this hearing Fullington testified correctly that he had bought the matchbox of marijuana on May 21, 1965, and Hebert testified that he had bought the 9 marijuana cigarettes on May 28, 1965. See R. 47 et seq.; R. 96 et seq.

As Louisiana has already pointed out above, Skinner and Gueldner could have subpoenaed Charbonnet to appear at their Preliminary Hearing, and could have called him as a witness if they had so desired. They clearly did not want Charbonnet present; they did not even serve copies of their pleadings on him or his attorney.

The State of Louisiana is of the respectful view that Skinner and Gueldner cannot rely on Charbonnet's absence from the hearings of their preliminary motions in their effort to obtain a new trial from this Court.

B. Charbonnet's Rights Were Not Infringed

The minutes of this case show that on August

26, 1965 Alton Charbonnet pleaded not guilty to the charge of sale and possession of marijuana, as did Skinner and Gueldner, and the trial judge ordered Charbonnet to return September 2, 1965 so that the matter of counsel could be determined.[2] On September 2, the matter of Charbonnet's counsel was continued to September 10, 1965, apparently on motion of Charbonnet. Hurricane Betsy struck New Orleans and the matter was further delayed. R. 1. On September 20, 1965, Charbonnet having informed the court that he was unable to employ counsel, the trial judge appointed attorney Joseph Monie to represent Charbonnet in this case, R. 2, and from this date on Charbonnet was never without counsel. For reasons of health Monie withdrew as Charbonnet's counsel and the trial judge appointed attorney Bently Byrnes to represent Charbonnet. Byrnes became seriously ill (he died shortly thereafter), and on January 11, 1966 the court appointed attorney Bernard Burk as Charbonnet's attorney. R. 4. On January 18, 1966 Charbonnet engaged Robert Link, his present attorney, to represent him. R. 5. Apparently because of illness none of the court appointed attorneys filed any pleadings on Charbonnet's behalf. See R. 104.

[2]In brief filed in this Court petitioners contend that one of the questions presented for decision is whether Charbonnet's constitutional rights were violated because he was arraigned without counsel. See Petitioners' brief, p. 3, par. 2. Louisiana considers this contention to be completely without substance in view of the fact that 1) Charbonnet entered a plea of not guilty; 2) the trial judge ordered Charbonnet to return the following week "to determine counsel"; and 3) no further proceedings occurred at the time of arraignment. R. 1.

Meanwhile, on September 21, 1965, the day following Monie's appointment as Charbonnet's attorney, Mr. G. Wray Gill, who had been employed by Skinner and Gueldner to represent them in this case, filed, on behalf of Skinner and Gueldner only, a Motion for Bill of Particulars; a Motion for Preliminary Examination; a Motion to Quash; a Motion to Quash Application for Search Warrant, Search Warrant itself and the Return on Said Search Warrant; a Motion to Suppress and Dismiss; a Prayer for Oyer; and a Special Plea of Entrapment, R. 2, 34-40, 66-72, 101. Counsel for Charbonnet did not join in these pleadings, nor did he file similar pleadings on behalf of his client.

On September 28, 1965 the State of Louisiana in response to the pleadings filed by Skinner and Gueldner, filed an Answer to the Motion to Quash; a Bill of Particulars; an Answer to the Special Plea of Entrapment; and an Answer to the Motion to Quash Application for Search Warrant, Search Warrant itself and Return of Said Search Warrant, R. 3.

On this same day, September 28, 1965, Mr. Gill *withdrew his Motion to Quash Application for Search Warrant, Search Warrant Itself, and Return on Said Search Warrant*, R. 3, for the reason that on the hearing of the Motion to Suppress it developed that at the time the Louisiana State Police searched Skinner's Motor Mart pursuant to a search warrant following the arrest herein, *nothing was found by the police in the mart and thus there was nothing to suppress.* R.

148. It should be borne in mind that the matchbox of marijuana and the 9 marijuana cigarettes which were offered in evidence by the State of Louisiana during the trial of this case had not been seized during a search, but rather had been purchased by undercover agents Fullington and Hebert from Charbonnet on Skinner's car lot, with the aid and consent of Skinner and Gueldner. See R. 419-425.

The trial judge ruled the State of Louisiana's Bill of Particulars and Answer to Motion to Quash to be good and sufficient in law, R. 3; the Special Plea of Entrapment was overruled, R. 3. It is important to note that the factual issue of entrapment which is not for the judge to determine prior to trial but is a question for the jury as part of its function of determining the guilt or innocence of the accused, see *Sherman v. United States*, 356 U.S. 369 (1958) was raised by the three accused at the trial of this case. See bill no. 9, R. 163; see also Petitioners' brief, p. 4.

On October 8, 1965 the trial judge heard the Motion For Preliminary Examination filed by Skinner and Gueldner for the sole purpose of determining whether the State of Louisiana had sufficient evidence to make out a prima facie case against Skinner and Gueldner.[3] See R. 38-39; see Arts. 154-155 of Lou-

[3]It is important to note here that Skinner, Gueldner and Charbonnet were at this time charged in separate bills of information with both sale and possession of marijuana under R.S. 40:962 based on the May 21 transaction, *and conspiracy to sell and possess marijuana* under Article 26 of the Louisiana Criminal Code, R.S. 14:26, based on the May 28 transaction. Both the sale and possession case (the instant one) and

isiana's 1928 Code of Criminal Procedure, formerly R.S. 15:154, 155, dealing with Preliminary Examination. (At a Louisiana Preliminary Hearing pleas of guilty or not guilty are not accepted; the judge merely decides whether the accused should be bound over for indictment or trial. Compare *Pointer v. Texas*, 380 U.S. 400, 402 (1965)). At the conclusion of this hearing (contrary to the contentions made in Petitioners' brief, pp. 5, 8) the judge held that the State of Louisiana had made out a prima facie case *as far as these two accuseds were concerned*, and bound Skinner and Gueldner over for trial. ("I do feel the State has made a prima facie case, however, as far as these two defendants are concerned:" R. 64) R. 4, 64; see Art. 155 of Louisiana's 1928 Code of Criminal Procedure, formerly R.S. 15:155. On that same day the State of Louisiana filed an Answer to Prayer for Oyer, which the trial court ruled was good and sufficient in law. R. 4.

On January 18, 1966 Charbonnet decided not to rely on court-appointed attorneys (who because of illness had been able to do nothing on his behalf) and

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the conspiracy case were allotted to Section E of the Criminal District Court for the Parish of Orleans, and identical Motions for Preliminary Examination, etc., were filed by Mr. Gill in both cases on the same date. Thus, contrary to the contention made by Petitioners on page 5 of their brief, it was quite proper for the trial judge to state at the end of Preliminary Examination, R. 64, that the State of Louisiana "has made a prima facie case of a conspiracy to sell narcotics," because the Preliminary Hearing which had just been held *involved both the instant sale and possession case and also the conspiracy case.* See R. 80-81.

engaged Robert S. Link, his present attorney, to represent him. R. 5.

On January 31, 1966 Mr. Link filed a Motion in the trial court in which motion, see R. 104-105, it is alleged that neither Alton Charbonnet nor any of his attorneys were present at the hearings of the various preliminary pleas which had been filed on behalf of Skinner and Gueldner, and the trial court is asked to make available to Charbonnet's attorney the transcript and/or record of all prior proceedings to

> "permit him to determine whether it is necessary to file supplemental motions in his own behalf and that a minimum of 30 days delay be granted in order for defense counselor to properly study and evaluate the record already taken in these matters *in order to file such pleadings as may be necessary in behalf of your defendant* ALTON J. CHARBONNET." R. 104-105. (Italics ours)

The same day as the above motion was filed, the trial judge ordered that the transcripts requested be furnished to Mr. Link. ("The Court . . . ordered the Court Reporter to furnish any and all transcripts to Mr. Link." R. 5)

However, although the pleadings and transcripts requested were promptly given to Mr. Link, and the trial in the present matter did not take place until March 21-22, 1966—almost two months later—Mr. Link filed no motions or pleadings of any kind on behalf of Charbonnet, nor were any pre-trial hearings for Charbonnet requested by him, From this inaction

on Mr. Link's part we can only infer that after studying and evaluating the pleadings, transcript, etc., which the trial court furnished him, Mr. Link decided that his client's rights had been fully protected in every way, and that no further motions needed to be filed on Charbonnet's behalf. This view gains considerable weight from Petitioners' brief, in which they concede on pages 10-11 that Mr. Link decided as a matter of strategy not to ask for special pre-trial hearings on behalf of Charbonnet. Also, the trial judge's action in delaying the trial at the request of Mr. Link indicated the willingness of the trial court to entertain and hear any pleas, motions, etc., which Charbonnet might have wished to file prior to trial.

Furthermore, Mr. Link made no objection prior to trial, or at any time during trial, to Charbonnet's absence from the pre-trial hearings held on motion of Skinner and Gueldner, and no prejudice to Charbonnet because of his absence was at any time called to the trial court's attention.[4] In this connection it is important to note that the two witnesses who testified at the hearing of the preliminary motions—Fullington and Hebert—repeated their testimony at the trial, at which time they were cross-examined by Charbonnet's counsel. R. 479-482, 579-582. It was only after the trial was finished and Charbonnet had been found guilty by the jury that Mr. Link, in a Motion

[4]In fact, Mr. Link used the transcript of the testimony offered at Skinner's and Gueldner's Preliminary Examination to cross-examine witnesses who testified at the trial of this case. See, e.g. R. 481-482.

For New Trial, *for the first time* complained to the trial judge of Charbonnet's absence from the pre-trial hearings held on motion of Skinner and Gueldner. See R. 108.

It is settled in the jurisprudence of Louisiana, and elsewhere, that an accused need not be present during the hearing of preliminary motions addressed to the court, and not making part of the actual trial of the guilt or innocence of the accused. *State v. Basco*, 216 La. 365, 43 So.2d 761; *State v. Pierre*, 39 La.Ann. 9, 3 So.60; *State v. Fahey*, 35 La.Ann. 9; 5 Wharton, Criminal Law and Procedure 141, sec. 2005 (Anderson, 1957); compare Articles 831, 834 of the present Louisiana Code of Criminal Procedure and Comments thereunder ("the defendant's presence is not required when motions are made and determined by the court outside of the jury's presence").

In *Snyder v. Massachusetts*, 291 U.S. 97, 105-106 (1934), this Court said that in a prosecution for a felony an accused who is being tried in a State court "has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." However, the opinion in *Snyder* draws a distinction between proceedings at the trial and those before and after ("Many motions before trial are heard in the defendant's absence, and many motions after trial or in the prosecution of appeals." 291 U.S. 107). To the same effect are the authorities cited in Petitioner's brief, pages 15-16. For example in 14 Am.Jur. 898,

899, secs. 189, 190, appears the following pertinent material:

> "At common law and under the decisions of many courts it is the right of the prisoner in a criminal case to be present throughout the entire trial from the commencement of the selection of the jury until the verdict is rendered and jury discharged. . . . The Supreme Court has taken the view that the presence of the defendant is a condition of due process under the Fourteenth Amendment to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."
>
> "* * *
>
> "The right to be present extends to every part of the trial proper. The defendant should be present on arraignment, when evidence is given, when the jury is charged, when the court communicates with the jury in answering questions by them, when the jury receives further instructions, when the verdict is returned, and when evidence is introduced for the purpose of determining the amount of punishment to be imposed. The right does not extend to matters not a part of the trial, such as matters purely preliminary to trial."

The cases relied on by Petitioners on page 16 of their brief—*Evans v. United States*, 284 F.2d 393 (6th Cir. 1960); *Jones v. United States*, 299 F.2d 661 (10th Cir. 1962); *Crowe v. United States*, 200 F.2d 526 (6th Cir. 1952); *Glouser v. United States*, 296 F.2d 853 (8th Cir. 1961)—are clearly not relevant to the present proceeding as all of these cases involve the

presence of the accused during the trial itself or later at sentencing.

Furthermore, *Pointer v. Texas*, 380 U.S. 400 (1965), also relied on by Petitioners, is irrelevant herein. There Pointer and Dillard were arrested and taken before a Texas judge for a Preliminary Hearing on a charge of having robbed Kenneth Phillips of $375. At this Preliminary Hearing neither of the accused had a lawyer. Phillips, testifying for the State, gave his version of the robbery in detail and identified Pointer as the man who had robbed him, but Phillips was not effectively cross-examined at this hearing because the accused were not represented by counsel at this time. Subsequently, Pointer was charged with the robbery, but before the trial could be held Phillips moved to California. At Pointer's trial on the robbery charge the State of Texas, being unable to produce Phillips as a witness, offered in evidence the transcript of the testimony which Phillips had given at the Preliminary Hearing. Eventually this Court granted certiorari and reversed Pointer's conviction on the ground that use of the transcript of Phillip's statement at Pointer's trial denied Pointer his right of cross-examination and his Sixth Amendment right to confront the witnesses against him and thus deprived him of a fair trial.

The case at bar is clearly distinguishable from *Pointer*. In the present proceeding, unlike the *Pointer* case, the witnesses who testified at the Preliminary Hearing and at the hearing of the abortive Motion to Suppress (Benjamin Fullington, R. 43-63; Russell

Hebert, R. 74-99) also testified at Charbonnet's trial, and were cross-examined at this time by Charbonnet's attorney, Mr. Link, and consequently Charbonnet's right to confront the witnesses against him, guaranteed to him by the Sixth and Fourteenth Amendments to the United States Constitution under *Pointer v. Texas, supra*, was in no way infringed. See R. 479-482, (cross-examination of Fullington); R. 579-582 (cross-examination of Hebert).

Moreover, unlike *Pointer*, in the instant case, although the transcript of the witnesses' testimony at the pre-trial hearings was of course not offered in evidence at the trial itself, counsel for Charbonnet used this prior transcribed testimony, which had been furnished him prior to the trial upon counsel's request and by order of the court, in attempting to impeach Fullington when cross-examining that witness. See R. 481-482.

In summation, Louisiana's position in regard to Charbonnet's absence from the hearing of the preliminary motions filed by his coaccused is as follows: First, that the presence of Charbonnet was not required during the hearing of the various pre-trial motions filed by Skinner and Gueldner in the instant case, as the question of Charbonnet's guilt or innocence was not involved therein, nor was there any ruling on the admissibility of evidence to be used at the trial; second, the State of Louisiana is of the respectful opinion that Charbonnet has waived all rights in the matter because the trial court at defense counsel's request furnished Mr. Link with copies of all pleadings and a transcript of all the evidence involved in these

preliminary matters, and allowed Mr. Link two months prior to trial in which to file any pleadings which Mr. Link thought necessary on behalf of Charbonnet; and third, any error, if it occurred, was harmless, because the witnesses who testified at the hearing of the preliminary motions repeated their testimony at the trial and were cross-examined at this time by Charbonnet's attorney, and at no time has Mr. Link pointed out how Charbonnet was prejudiced or how he suffered any unfairness because of his absence from these pre-trial hearings.

2. No Prejudice to the Accused Resulted Because the Trial Lasted Until 2:45 A.M. the First Day

This allegation of error centers around bill of exception number 23, which was reserved after the trial judge refused to grant a recess of more than 35 minutes after the prosecution rested at 11:30 p.m. on the first day of the two day trial. R. 221-228.

The trial of the instant case began on the morning of March 21, 1966. R. 6. After the jury had been selected the court ordered a recess for lunch. R. 7. At 2:45 p.m. the jurors returned to their seats in the jury box and the court ordered the trial to proceed. R. 7. From 6:15 to 8 p.m. there was a recess for dinner. R. 9. At 11:40 the State rested its case. R. 11. At this time defense counsel complained of feeling tired and asked for a recess. R. 604.

BY THE COURT: You have been after me all day, Mr. Gill. I've gotten tired of listening to you. I'm going to see if we can't finish this case tonight.

Go to work and see if we can't finish the case tonight.

BY MR. GILL: I'll do what Your Honor says.

BY THE COURT: I'm sure everyone is tired. I have already asked the jury if they wanted to attempt to finish this case tonight and if we went to work on it without talking so much . . .

BY MR. GILL: I want to say one thing, Your Honor, I have a severe case of diabetes.

BY THE COURT: I know you have been ill and I know we have been having continuances on top of continuances because you have been ill but I have my duties to perform too and one of them is this case. I will gladly give you a recess for about three minutes and then we will come back and proceed with this case.

BY MR. GILL: May I further say this. I tested myself for sugar . . .

BY THE COURT: We will take a recess for three minutes.

BY MR. GILL: If Your Honor please, I respectfully request Your Honor declare a mistrial.

See R. 604-605.

To the overruling of his Motion for a Mistrial Mr. Gill reserved bill 23. R. 604-605, 221.

The defense then took a recess of thirty-five minutes and proceeded to put on its case from 12:25 a.m. until 2:45 a.m., when the defense rested. R. 12, 605-688. During these two hours and twenty minutes Mr. Gill called to the stand Thomas Cardona, R. 606-611;

James Comeaux, R. 611-613; Joseph Marino, R. 613-618; Hugh Wilbourn, R. 618-619; Marie Wilbourn, R. 620-621; Gilbert Andry, R. 621-624; Floyd Russell, R. 624-626; Virgie Niette, R. 626-639; Helaine Harp, R. 639-647; Bobbie Moffett, R. 648-652; Walter Gordon, R. 652-658; Bernard Sweeney, R. 659-660; Alfred Middleton, R. 660-662; Mrs. Charles Arbour, R. 662-667; Charles Arbour, R. 667-671; Bernard Keenal, R. 671-680; and Stevanna Stevens, R. 680-687. All of these witnesses were extensively questioned by defense counsel.

The defense rested at 2:45 a.m., court recessed a little before 3 a.m., and reconvened at 9:30 the following morning. R. 687, 12. It is important to note that neither Mr. Gill nor Mr. Link objected when at 2:45 a.m. the trial judge declared a recess until 9:30 a.m. See R. 12. When court convened the next morning at 9:30 a.m. no complaint was made to the court by defense counsel about lack of sleep, fatigue or illness. Mr. Gill and Mr. Link made their closing arguments to the jury on behalf of the accused and the trial judge charged the jury, which then retired to deliberate at 2:45 p.m. At 5:10 p.m. the jury announced to the court their verdict of guilty as charged on both counts as to all three of the accused. R. 12-13.

Under Article 320 of Louisiana's 1928 Code of Criminal Procedure, then R.S. 15:320, the granting or refusing of a continuance (or recess as it is called after the trial has begun) is within the sound discretion of the trial judge. It is well settled that the trial judge's refusal to grant a continuance or recess will not be

reversed on appeal unless his ruling is found to be arbitrary and prejudicial. See *State v. Ganey*, 246 La. 986, 169 So.2d 73; *State v. Jones*, 233 La. 775, 98 So.2d 185; *State v. Forsyth*, 229 La. 690, 86 So.2d 536.

The State of Louisiana concedes that it was hard on the lawyers involved to get only a few hours of sleep on the night of March 21-22, 1966, during the trial of this case, but how were the accused prejudiced?

As the record herein bears out, Mr. Gill and Mr. Link called seventeen witnesses and put on a vigorous defense on the night of March 21-22. On the morning of March 22 Mr. Gill and Mr. Link made spirited arguments to the jury on behalf of the three accused—Mr. Gill's closing argument lasted for about an hour and a half. And during this time the defense reserved 8 bills of exception (bills 23-30).

Petitioners argue to this Court that the trial judge should have granted a recess at 11:40 p. m. on the first day of the trial because Mr. Gill was ill and tired. The answer to this contention is that Mr. Gill nevertheless conducted a competent defense in this case. If the contrary situation had prevailed, and Mr. Gill, or his associate, had not been able to adequately defend the accused, the trial judge would undoubtedly have called a recess before 2:45 a.m.

In *Mende v. United States*, 282 F.2d 881 (9th Cir. 1960), trial counsel requested a continuance because of a facial affliction. In finding no abuse of discretion on the part of the trial judge who denied the continuance, the Court of Appeals for the Ninth Circuit said:

"The transcript indicates that this trouble did not affect the quality of counsel's mental activity."

It was held in *Maher v. State*, 144 Neb. 463, 13 N.W.2d 641, cert. denied 323 U.S. 757, 65 S.Ct. 91, 89 L.Ed. 606, that since it appeared from the record that defense counsel was vigorously active in behalf of his client and fully protected his interest throughout the trial, there was no abuse of discretion in denying a continuance requested because of counsel's health.

In *Day v. State*, 123 Tex.Crim. 9, 57 S.W.2d 581, in approving the refusal of a continuance where it had been claimed that the accused's attorney was suffering from a throat infection making it difficult for him to talk, the court noted the trial judge's statement that the defense was conducted very ably and that there was no difficulty in hearing counsel.

It was held in *Lewis v. State*, 125 Tex.Crim. 66, 65 S.W.2 771, that there was no error in refusing a continuance where an attorney who claimed to have been so ill as to be unable to properly represent his client appeared at the trial, ably presented the case, examined the witnesses and argued to the jury, showing no effects of his alleged illness.

For a discussion of the above cases and others on the same point, see Anno: Continuance—Counsel—Illness or Death, 66 A.L.R.2d 267, 275-279 (1959).

As for the contention raised *for the first time in Motion For a New Trial* that a couple of the jurors had fallen asleep during the trial, this Court's attention is directed to the fact that no objection to sleeping jurors was made at the trial. Mr. Gill admits that he

made no such objection during trial, excusing himself on the ground that he was too tired to object at the time. R. 323. However, we note that Mr. Gill was not too tired at this time to call and examine 17 defense witnesses, argue to the jury for an hour and a half and reserve eight other bills of exception (bills 23-30). Further, all of the jurors who testified at the hearing of the Motion For a New Trial *categorically denied that any member of the jury had at any time been asleep during the trial.*

In brief filed in this Court Petitioners allege that at the hearing of the Motion For New Trial there was testimony by jurors, bystanders and the trial judge's crier that two jurors had apparently been sleeping, or at any rate had their eyes closed, during the trial. Brief, pp. 19-20. An examination of the testimony which was taken at the New Trial hearing shows that there is no credible evidence to suggest that any juror was sleeping at any time during the trial of this case.

In this connection it is significant to note that although defense counsel summoned to this hearing all thirteen of the petit jurors who sat on this case (12 regular jurors and 1 alternate), and twelve of the summoned jurors appeared, defense counsel only called three of the jurors to the witness stand, permitting the trial court to discharge the other nine after the first two jurors called to testify (Landry and Wilson) denied that they or anyone else on the petit jury had been either asleep or excessively tired during the trial of this case. See R. 259-281, 309.

Moreover, the six witnesses who testified that some of the jurors were sleeping during the trial were all either defense witnesses, or were employees, relatives or close friends of one or more of the accused, or both. Further, the testimony of those interested witnesses is in complete disagreement as to whether the allegedly sleeping jurors were one or two in number, whether the sleeping occurred in the front or back row of the jury box, and whether the sleeping occurred during the late night hours when the defense was putting on its case or only the next morning while closing arguments were being made to the jury, no single witnesses testifying that the sleeping occurred at both times. The only point of agreement among the various witnesses is that the sleeping juror, or both sleeping jurors, were one or both of the Negro jurors who sat on the case. See R. 282-321.

The only credible evidence on this issue is the testimony given by Sal Marchese, the trial judge's crier; the testimony of Landry, Wilson and Jones, the three jurors who were called to the stand; and the finding of fact which was made by the trial judge. Marchese testified that on the second day of the trial, during the closing argument to the jury by Mr. Gill, he noticed Mr. Landry, one of the colored jurors, sitting in a relaxed position with his eyes closed and his head leaning on his hand. R. 350-351. Landry testified that at no time did he go to sleep or even doze during the trial, and that he did not feel excessively tired at this time. R. 259-271. Wilson, who apparently brought in a vote of Not Guilty in the instant

case (the jury verdict was 9-3; See Art. 7, Sec. 41, La. Const.), testified that no one on the jury was at any time sleeping or nodding, or even appeared to be very tired. R. 271-281. Jones testified that he was tired when the trial lasted into the morning hours on the first day, and rested his eyes once in a while, but that at no time was he asleep, and that when the trial judge sometime between 1:30 and 2 in the morning asked all of the jurors whether or not they wanted to continue with the trial or to recess to the next day, he had answered that he wanted to "finish up". R. 346-348. The trial judge states that the defense "offered no proof whatsoever" that any of the jurors was asleep. R. 395.

The fact that defense counsel made no objection to sleeping jurors during the trial is a very strong factor to be considered by this Court in determining the credibility of the evidence offered on this question at the New Trial hearing, in the respectful opinion of the State of Louisiana. Surely astute defense counsel such as Mr. Gill and Mr. Link would have called the trial judge's attention to such a state of affairs if it had in fact existed, and would have immediately requested a mistrial. Further, if one of the jurors had fallen asleep during the trial of this case, and the trial court's attention had been directed to that fact, the sleeping juror could have been dismissed by the trial judge and his place taken by the alternate juror, Gaston F. Moore, Jr., who was there in the event of just such an emergency. See R. 257, 255-256.

It is not as though the attorneys and the jury in

the instant case were required to work night after night and day after day with little or no sleep. The episode complained of amounted to *one night;* the trial was finished by the afternoon of the following day. Surely adult men can miss a little sleep one night without having their faculties impaired.

Moreover, the record in this case shows that Mr. Gill had *already been granted a great number of continuances* in the trial of the present matter. On January 18, 1966, on motion by defense the matter was continued until January 31, 1966. R. 5. On January 31, 1966, on motion by Mr. Gill the matter was continued until February 24, 1966. R. 5. On February 24, 1966, on motion by the defense the court ordered the case continued until March 15, 1966. R. 6. On March 15, 1966, on motion by defense the proceeding was continued until March 21, 1966. R. 6. As the trial judge told Mr. Gill when refusing to grant him a continuance at 12 midnight on March 21, 1966, "I know you have been ill and I know we have been having continuances on top of continuances because you have been ill but I have my duties to perform too and one of them is this case." R. 605.

The State of Louisiana calls this Court's attention to the fact that 1) Mr. Gill produced no medical evidence whatsoever on the night of the trial when he asked for and was refused a continuance; 2) nor did Mr. Gill or Mr. Link object and ask for a longer recess when, at 2:45 a.m., the trial court adjourned until 9:30 a.m. the following day, R. 12; 3) nor did Mr.

Gill produce medical evidence of disability the following morning; (4) or even ask for a continuance at this later time; and 5) Mr. Link never at any time complained of fatigue or asked for a recess. It was only *months later*, at the hearing of the Motion For a New Trial, that Mr. Gill called his physician, Dr. Ben Morrison, into court to give evidence about counsel's alleged ill health at the time of the trial. R. 337 et seq. If Mr. Gill had really been ill on the night of the trial, he could easily have contacted Dr. Morrison during the thirty-five minute recess which preceded the putting on of the defense herein, and Dr. Morrison could have offered evidence on the condition of Mr. Gill's health to the court that very night, or the following morning before court reconvened at 9:30 a.m. Also, it should be noted that Mr. Gill's associate, Mr. Robert Link, was at all times present in court and ready to assist Mr. Gill during the trial, but was never called on for help by Mr. Gill, who conducted the defense of Skinner and Gueldner himself. R. 605-688. And finally, this Court's attention is called to the fact that Mr. Gill's stay in the hospital following the trial of this case was for.

In concluding argument on this third allegation of error the State of Louisiana respectfully contends to this Court that the accused herein suffered no prejudice from the ruling of the trial judge refusing to grant the defense more than a 35 minute recess after the prosecution had rested on the first day of the trial. That the accused were in no way prejudiced by this ruling is clear from the vigorous defense put on by

Mr. Gill and Mr. Link on the night of March 21-22, when they called seventeen witnesses to the stand, and questioned them at great length; from their vehement arguments to the jury the following morning (Mr. Gill's argument lasted about 1½ hours); and from the many bills of exception reserved by defense counsel during this period of the trial. In addition, the testimony of the jurors who took the stand at the hearing on the Motion For a New Trial showed positively that the jury in this case wanted to work late into the night and had so informed the judge, and that the jurors remained alert and interested in the proceedings throughout the trial. The treatment of a Chronic condition and had been arranged prior to the trial. R. 328-329.

3. The Judge's Charge to the Jury on the Law of Conspiracy Was Correct

This allegation of error is grounded on bill of exception number 29, which was reserved to that portion of the trial judge's charge to the jury which dealt with criminal conspiracy. R. 252-253. For this portion of the judge's charge, see per curiam of trial judge to bill 29, R. 356-359. Among other things the trial judge's general charge contained the following pertinent material:

> "The weight and sufficiency of the evidence to prove a criminal conspiracy is a matter for the jury, and so is the existence of the conspiracy.
>
> "* * *
>
> "When a conspiracy is entered into to do an

unlawful act, all persons engaged therein are responsible for all that is done in pursuance thereof by any of the conspirators, until the object for which the conspiracy was entered into is fully accomplished.

"This responsibility is not confined to the accomplishment of the common design for which the conspiracy was entered into, but it extends to, and includes, collateral acts and (those) incidental (to) and growing out of the common design.

"It is for you to determine, gentlemen, as a matter of fact, from all of the evidence submitted to you, whether or not a conspiracy has been established, beyond a reasonable doubt, and that the defendants on trial were engaged in the said conspiracy.

"*Unless you are satisfied that a conspiracy has been established I charge you that the acts and declarations of one of the parties to the alleged conspiracy do not bind the other.*"
R. 357-359. [5]

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[5]Petitioners did not object to the above portion of the judge's charge on the ground that it was an incorrect statement of the law of conspiracy. For the correctness of the judge's definition of criminal conspiracy, see 1 Wharton's Criminal Law and Procedure 171-221, Ch. 7, esp. pp. 194-198 (Anderson 1957). Rather, their objection appears to be grounded on the theory that it was error to charge the jury concerning the law of conspiracy because conspiracy was not formally charged in the bill of information. See Petitioners' brief, p. 24, in which they say that the trial judge "gave a charge on the full law of conspiracy although no conspiracy was charged in this case."

A. The Louisiana Law of Conspiracy

Before proceeding further the State of Louisiana would like to discuss briefly the crime of conspiracy as defined by Article 26 of the Louisiana Criminal Code. R.S. 14:26. In Louisiana, unlike some jurisdictions, conspiracy is the agreement or combination of two or more persons for the specific purpose of committing a crime and is an inchoate offense, similar to attempt, although unlike attempt, a person can be prosecuted for both the conspiracy and the completed offense. Under Article 26 of the Louisiana Criminal Code, R.S. 14:26, the punishment prescribed for conspiracy to commit a crime is considerably less than the punishment prescribed for commission of the crime itself. Thus, in Louisiana the State does not prosecute a person for conspiracy unless the intended offense is not completed, or proof of the consummated crime is difficult, or the completed crime occurs in another jurisdiction. For a discussion of the Louisiana law of conspiracy as embodied in Article 26, see Bennett, *The Louisiana Criminal Code*, 5 La.L.Rev. 6, 19. (1942).

Furthermore, in Louisiana an indictment which charges conspiracy to commit a crime in one count and the crime itself in another count is bad for duplicity because although conspiracy is an inchoate crime, nevertheless when the basic crime has been consummated the conspirators may be tried for either the conspiracy or the completed offense, and under Article 493 of the Louisiana Code of Criminal Procedure no indictment may charge more than one offense. See also

former R.S. 15:217, the predecessor of Article 493, which was in effect at the time the instant case was tried; compare Fed.R.Crim. P. 8, 14, which allow a joinder of offenses in an indictment if the offenses constitute part of a common plan, and if the accused is not prejudiced thereby.

From the foregoing it is evident that in the instant case the State of Louisiana could not have charged these accused in one bill of information with both sale and possession of marijuana on May 21, 1965 and conspiracy to sell and possess marijuana on this or any other date.

B. The Instant Case

In the instant case Skinner, Gueldner and Charbonnet were jointly charged in two counts of a bill of information with possessing and selling marijuana on May 21, 1965.[6] R. 22-23. It is settled in Louisiana that where an information charges two or more persons jointly with a crime, *the charge involves a conspiracy* although the information does not expressly

[6]As was pointed out in footnote 3, Skinner, Gueldner and Charbonnet were also charged in a separate bill of information with conspiracy to sell and possess marijuana under Article 26 of the Louisiana Criminal Code, R.S. 14:26, the conspiracy charge being based on the May 28 sale. Both the sale and possession case (the present one) and the conspiracy case were allotted to Section E of the Criminal District Court for the Parish of Orleans, and identical Motions for Preliminary Examination, etc., were filed by Mr. Gill in both cases on the same date. Further, the Preliminary Hearing which was held on behalf of Skinner and Gueldner involved both the instant sale and possession case and the conspiracy case, although the present sale and possession case was tried separately from the conspiracy charge, which has never been tried.

charge conspiracy in formal terms. *State v. Robichaux*, 165 La. 497, 115 So. 728; *State v. Terrell*, 175 La. 758, 144 So. 488; *State v. Melerine*, 236 La. 929, 109 So.2d 471. Hence the instant charge of sale and possession against Skinner, Gueldner and Charbonnet involves a conspiracy under Louisiana law, and under the law of many other jurisdictions. See 4 Wharton's Criminal Law and Procedure 591, esp. n. 12 (Anderson 1957).

During the instant trial, frequent objections to testimony were made by Mr. Gill on behalf of Skinner and Gueldner on the ground that the conversation, act, etc., referred to by the witness occurred out of the presence of his clients, and that conspiracy had not been charged in the bill of information herein. See, *e.g.*, bill of exception number 19, R. 206. The trial judge correctly overruled all such objections on the basis that the bill of information herein jointly charges the 3 accused with possessing and selling marijuana, that the State of Louisiana had made out a prima facie case of conspiracy, and that consequently the evidence was admissible under La. R.S. 15:455, which provides that each co-conspirator is deemed to commend whatever is said or done in furtherance of the common enterprise, and it is of no moment that such act was done or such declaration was made out of the presence of the conspirator sought to be bound thereby, but to have this effect a prima facie case of conspiracy must have been established. R. 209.

The trial judge's ruling was in accord with the settled jurisprudence of the Louisiana Supreme Court.

See *State v. Gebbia*, 121 La. 1083, 47 So.32; *State v. Brasseaux*, 163 La. 686, 112 So. 6501; *State v. Terrell*, 175 La. 758, 144 So. 488; *State v. Gunter*, 180 La. 145, 156 So. 203; *State v. Melerine*, 236 La. 929, 109 So.2d 471; see also Marr's Criminal Jurisprudence of Louisiana, vol. 2, p. 848 (2d ed. 1923).

Later, in giving his charge to the jury the trial judge instructed the jury in detail on the definition and nature of conspiracy, told the jurors that it was for them to determine, from the evidence, whether or not a conspiracy had been established by the State of Louisiana, and that unless they were satisfied that a conspiracy had been shown, "I charge you that the acts and declarations of one of the parties to the alleged conspiracy do not bind the others". [7] R. 356-359.

In charging the jury in the present case on, among other things, conspiracy, the trial judge was following the mandate of Article 385 of Louisiana's 1928 Code of Criminal Procedure, formerly R.S. 15:385, and the unquestioned rulings of the Louisiana Supreme Court. See *State v. Taylor*, 173 La. 1002, 139 So. 325; *State v. Terrell*, 175 La. 758, 144 So. 488; *State v. Capaci*, 179 La. 462, 154 So. 419. [8]

[7] In their Petition for Certiorari filed in this Court petitioners contend that they were prejudiced by the judge's charge to the jury on conspiracy. The State of Louisiana believes that the contrary is true, and that the judge's admonition to the jury not to impute the acts and declaration of one of the 3 accused to the other 2 unless a conspiracy had been proved beyond a reasonable doubt, was helpful to the accused, if anything, and certainly not prejudicial.

[8] In reversing the conviction on first hearing on the ground that the trial judge erred in charging the jury on con-

This Court's attention is directed to the fact that it is the prevailing rule *in many jurisdictions* that where there is evidence that the accused have entered into a conspiracy to commit the crime charged, an instruction to the jury on the law of conspiracy is proper, even though the indictment or information does not formally charge a conspiracy. See 53 Am.Jur., Trial, sec. 673, p. 519; 23A C.J.S., Criminal Law, sec. 1278, p. 692; Conspiracy Not Charged, 66 A.L.R. 1311, 1314 (1935)

C. Second-Crack Doctrine

Furthermore if the issue posed by the trial judge's charge to the jury in the instant case is viewed as a question of whether the judge or the jury should pass on the admissibility of evidence during a criminal trial, it is submitted that Louisiana's "second-crack" method of dealing with this problem is the best of the various solutions which have been proposed by the eminent legal scholars who have wrestled with the issue. For material dealing with this question, see Maguire and Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 Harv.L.Rev. 392 (1926); Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 Harv.L.Rev.

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spiracy, the Louisiana Supreme Court relied on its decisions in *State v. Fletcher*, 236 La. 40, 106 So.2d 709; and *State v. Gunter*, 208 La. 694, 23 So.2d 305, which are contrary to the great weight of the Louisiana jurisprudence on this point, and which simply hold that it was not reversible error in those particular cases for the trial judge to fail to charge the jury on conspiracy.

165 (1929); Morgan, *The Law of Evidence, 1941-1945*, 59 Harv.L.Rev. 481, esp. "Function of Judge and Jury," 488-495 (1946); McCormick, *Preliminary Questions of Fact Arising On Objections*, in Evidence 122-126 (1954); 9 Wigmore, Evidence 501-503 (3d ed. 1940); Maguire, *Preliminary Findings of Fact*, in Evidence: Common Sense and Common Law 211-231 (1947); *Role of Judge Where Preliminary Question of Competency Coincides With Ultimate Issue*, 20 U. Chi. L.Rev. 313 (1953); Barnhart, *The Determination of Facts Preliminary to Admission of Evidence in the Arkansas Courts*, 2 Ark.L.Rev. 1, 17-20 (1947); *Evidence-Province of Judge and Jury in Determining Preliminary Questions of Fact in New York*, 23 N.Y.U.L.Q.Rev. 472 (1948); 2 Conrad, Modern Trial Evidence 352 (1956); Fisch, New York Evidence § 26 (1959).

Although the general rule is that in a criminal trial the question of the admissibility of evidence is a matter for the trial judge rather than the jury to determine, *Ford v. United States*, 273 U.S. 593, 605 (1927), cases in which the preliminary question of fact coincides with the ultimate issue for the jury pose perplexing problems. A trial involving a conspiracy is a prime example of such a coincidence case. See *Role of Judge Where Preliminary Question of Competency Coincides With Ultimate Issue*, 20 U. Chi. L.Rev. 313 (1953); Barnhart, *The Determination of Facts Preliminary to Admission of Evidence in the Arkansas Courts*, 2 Ark.L.Rev. 1 (1947).

La. R.S. 15:455 provides that each coconspirator

is deemed to assent to or commend whatever is said or done in furtherance of the common enterprise, and it is therefore of no moment that such act was done or such declaration was made out of the presence of the conspirator sought to be bound thereby, but to have this effect a prima facie case of conspiracy must have been established.

La. R.S. 15:455 is a codification of the rule of evidence which governs trials involving conspiracy in all jurisdictions. See *Logan v. United States*, 144 U.S. 263, 308-309 (1892); *Conn. Mut. Life Ins. Co. v. Hillman*, 188 U.S. 208, 218 (1902); 1 Wharton's Criminal Law and Procedure 194-198 (Anderson, 1957).

The question which has perplexed many courts and legal writers is whether the trial judge or the jury should determine the existence of a conspiracy as a preliminary fact in order to bring into play the rule of evidence that a conspirator is bound by the acts and declarations of his coconspirator which take place out of his presence.

The orthodox rule is that the admissibility of a given piece of evidence is for the judge to determine. See 9 Wigmore, Evidence 501 (3d ed. 1940). However, in cases, such as those involving conspiracy, in which the question of admissibility merges imperceptibly into the weight of the evidence and the preliminary question of fact is in effect indistinguishable from the ultimate issue of guilt or innocence, to permit the trial judge alone to decide the preliminary question results in depriving the accused of his right to trial by jury.

See Maguire, Evidence: Common Sense and Common Law 217 (1947); compare *Duncan v. Louisiana*, ____ U.S. ____ (1969). For example in the classic case of *State v. Lee*, 127 Lo. 1077, 54 So. 356 (1911), it was agreed that Mack Lee had committed the murder for which the accused was being tried. The accused insisted that he was not Mack Lee, but rather Guy Fenner. At the trial the defense offered Mrs. Mack Lee as a witness to testify that the accused was not her husband. In Louisiana at that time a wife could not testify for or against her husband. Upon objection by the prosecution the trial judge found that Mrs. Mack Lee was in fact the wife of the accused and on this basis sustained the objection and excluded the witness' testimony, assigning as his reason that he was satisfied that the prisoner was Mack Lee. Thus, in *Lee* since the evidence excluded was decisive, it can be argued that the judge rather than the jury decided the guilt of the accused. See *Role of Judge Where Preliminary Questions of Competency Coincides With Ultimate Issue*, 20 U. Chi. L.Rev. 313, 316 (1952). Fortunately, the conviction was reversed on another ground.

For a more recent case in which the trial judge determined a disputed preliminary question of fact which coincided with the ultimate jury question on the merits, see *Carbo v. United States*, 314 F.2d 718, 735-737 (9th Cir. 1963). See also *Gila Valley Ry. Co. v. Hall*, 232 U.S. 94 (1913), in which one of the questions was whether the plaintiff, Hall, knew of a defect in a wheel. A witness was offered to testify that one Regna remarked about a crack in the wheel within Hall's hear-

ing prior to the accident in which Hall was injured. Upon objection by the defense the judge ruled that Regna's testimony was inadmissible apparently being of the opinion that Hall had not heard it. This Court upheld the judge's determination of this question of fact on the ground that "questions of the admissibility of evidence are for the determination of the court." 232 U.S. at 103. However, it has been suggested that the issue of whether Hall heard Regna's remark, and thus had notice of the defective wheel, was a matter which should have been decided by the jury rather than the judge. See Morgan, *Functions of Judge and Jury*, 43 Harv. L.Rev. 165, 172 (1929).

The opinion has been advanced by one text writer that if the judge can determine such matters, then by clever manipulation he can remove almost any material issue from the province of the jury. See Morgan, *Functions of Judge and Jury*, 43 Harv. L.Rev. 165, 172 (1929).

Louisiana believes that the criticism of the orthodox rule in coincidence cases is justified because it permits the trial judge to usurp the jury's role.

In direct contrast to the orthodox rule, some questions of admissibility are left entirely to the jury in a number of jurisdictions. This practice has also been criticized on the ground 1) that it is a needless abdication of the judicial function, and 2) that it results in a total abandonment of exclusionary rules wherever their applicability depends upon the decision of a preliminary question of fact. See 9 Wigmore, Evidence 502-

503 (3d ed. 1940); Morgan, *Functions of Judge and Jury*, 43 Harv.L.Rev. 165, 177 (1929).

Louisiana courts, like those of many jurisdictions, have abandoned the orthodox rule in cases involving conspiracy, such as the instant one, and have substituted therefore the "second-crack" doctrine, whereby the judge admits the questioned evidence upon a prima facie showing by the prosecution that a conspiracy exists among the joint accused, and then at the end of the trial instructs the jury not to impute the acts or declarations of one accused to the others unless the jury is convinced beyond a reasonable doubt that a conspiracy existed among the accused. See 2 Marr's Criminal Jurisprudence of Louisiana 848 (2d ed. 1923); Barnhart, *The Determination of Facts Preliminary to the Admission of Evidence in the Arkansas Courts*, 2 Ark.L.Rev. 1, 17-20 (1947); *People v. Talbot*, 65 Cal.App.2d 654, 151 P.2d 317 (1944);[9] Maguire, Evidence: Common Sense and Common Law 219-220 (1947). Such a procedure, in the respectful view of Louisiana, permits both the judge and the jury to perform their traditional roles, and thus combines the best features of the two extreme views described above. In fact, one writer suggests that under this method of handling the question the merits of the orthodox rule

[9]*People v. Talbot*, supra, contains a very shrewd analysis of the problem from a criminal procedure viewpoint, noting that there is no need for conspiracy instructions to the jury even in a case involving a conspiracy unless during the trial the prosecution invokes the rule of evidence pertaining to the acts and declarations of a conspirator, such as La. R.S. 15:-455, in which case such an instruction is imperative.

are lost. See *Role of Judge Where Preliminary Question of Competency Coincides With Ultimate Issue*, 20 U.Chi.L.Rev. 313, 318, n. 30 (1952).

A recent case which treated the question here at issue in the same way that it is handled in the Louisiana courts is *United States. v. Hoffa*, 349 F.2d 20, 41-42 (6th Cir. 1965). Here the accused were originally charged in one count of an indictment with endeavoring to influence, intimidate and impede petit jurors in the discharge of their duties and in another count of the indictment with conspiracy to commit this crime. Prior to trial the count charging conspiracy was severed by order of the court. Nevertheless, during the trial for the substantive crime evidence of a conspiracy was admitted, just as in the instant proceeding, apparently in order to bring into play the federal rule of evidence which is similar to La. R.S. 15:455. At the conclusion of the trial, also as in the instant case, the judge defined conspiracy and instructed the jury that it could consider an out-of-court statement only as to the particular accused who made the statement, unless the jury was satisfied that the person making the statement was a co-conspirator of one or more of the other accused, in which event the jury could consider such evidence against any other accused shown by the evidence to have been a co-conspirator. On appeal the accused contended that the trial court should have determined as a matter of law whether there was proof of a conspiracy instead of submitting the question to the jury, relying on *Carbo v. United States*, 314 F.2d 718 (9th Cir. 1963), cert.

denied 377 U.S. 953 (1964); and *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950), aff'd 341 U.S. 494 (1951) (limited to the validity of Sections 2 and 3 of the Smith Act). The Sixth Circuit Court of Appeals affirmed the convictions holding that there was sufficient evidence to make out a prima facie case linking appellants with the conspiracy, and that submitting the issue to the jury instead of determining it as a matter of law was more favorable to appellants, and they were not prejudiced thereby. This Court granted certiorari and affirmed, but limited its grant of certiorari to the single issue of whether the Government's use of certain evidence supplied by a secret informer operated to invalidate the convictions. *Hoffa v. United States*, 385 U.S. 293 (1966).

It appears from the *Hoffa* opinion in the Sixth Circuit that some of the United States Courts of Appeal are split between the orthodox rule and the variation of that rule which is followed in Louisiana, with the Ninth and Second Circuits following the orthodox rule, see *Carbo v. United States, United States v. Dennis*, supra, and the Sixth Circuit following the procedure which is used in Louisiana.

Jackson v. Denno, 378 U.S. 368 (1964), in which this Court held that the trial judge in a criminal trial must make a clear-cut determination of the voluntariness of a confession and cannot leave this determination to the jury, is clearly distinguishable from a case such as the instant one involving conspiracy.

Initially it should be noted that Professor Edmund

H. Morgan, who suggested in his article *Functions of Judge and Jury*, 43 Harv.L.Rev. 165, 167-169 (1929), that the issue of the voluntariness of a confession should be determined by the judge and not the jury, and who was cited as authority in this Court's opinion in *Jackson v. Denno*, (see n. 15 at 378 U.S. 389), approves of the decision of the preliminary fact by the jury *when, as in cases involving conspiracy, the preliminary fact coincides with an ultimate fact for the jury*. See Morgan, op. cit. supra, 177-183.

Second, the question of the voluntariness of a confession has a "true independent identity", whereas the preliminary question of fact in coincidence cases such as one involving conspiracy has "no true independent identity", to quote from Maguire and Epstein, *Preliminary Questions of Fact*, 40 Harv.L.Rev. 392, 418 (1926). Thus the issue of the voluntariness of a confession lends itself very readily to a clear-cut preliminary decision by the judge, whereas the existence or not of a conspiracy among joint defendants is a question which is inseparable from the issue of the guilt or innocence of the accused—that is, the question of admissibility "merges imperceptibly into the weight of the evidence, if admitted." *DiCarlo v. United States*, 6 F.2d 364, 367. As Wigmore says, ". . . so far as the admissibility in law depends on some *incidental* question of fact—. . . the use of threats to obtain a confession . . . and the like—this also is for the judge to determine, before he admits the evidence to the jury." 9 Evidence 501 (3 ed. 1940).[10] (Italics ours)

[10]The same reasoning applies to the determination of

Third, as this Court said in *Jackson v. Denno*, an accused is deprived of due process of law if his conviction is founded upon an involuntary confession, without regard for the truth or falsity of the confession. 378 U.S. at 376. Thus the issue for decision by the judge in determining the admissibility of a confession is one of *competency* and not one of *relevancy*, and the learned treatises which deal with the question posed here appear to be agreed that when the competency of A depends upon the existence of B, the existence of B should always be for the judge, whereas when the relevancy of A depends upon the existence of B, the existence of B should normally be for the jury. See Morgan, *Functions of Judge and Jury*, 43 Harv.L.Rev. 165, 167-169 (1929); Barnhart, *Determination of Facts Preliminary to Admission of Evidence in the Arkansas Courts*, 2 Ark.L.Rev. 1, 17-20 (1947). The rationale underlying this distinction is that a jury is likely to disregard an exclusionary rule, as this Court noted in *Jackson v. Denno*, at 378 U.S. 388. However, "when the conditioning fact determines merely the relevancy of the offered fact there is no need for any special safeguarding procedure, for relevancy is a mere matter of probative pertinence which the jury understands and is willing to observe." McCormick, Evidence 125 (1954).

Fourth, the question of whether a confession was voluntarily made, or whether evidence was constitu-

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whether evidence was constitutionally obtained under the Fourth Amendment. See, in this connection, *Steele v. United States*, 267 U.S. 505, 511 (1925).

tionally seized, are matters which have absolutely nothing to do with the commission of the crime itself, but concern themselves, rather, with the problem of whether the evidence on which the prosecution relies was constitutionally obtained. Thus, when a trial judge passes on the voluntariness of a confession or decides a motion to suppress he is not usurping the role of the jury because he is not passing on the ultimate issue of guilt or innocence, but is only determining what evidence the prosecution can use in trying to prove guilt. However, when the question of admissibility is indistinguishable from the issue of guilt or innocence, as in the case at bar, the best way to handle the problem appears to be as it is done in the Louisiana courts, with the trial judge making a preliminary, but tentative, finding of fact, leaving it to the jury to pass on the question again while reaching their verdict on the merits.

In their brief filed in this Court petitioners have not argued the conspiracy issue, being of the opinion that it is lacking in "national interest". Brief, p. 25. However, in their Petition for Certiorari they claim that the conspiracy portion of the trial judge's charge prejudiced them because, among other things, it was combined with the "system and intent" rule of evidence "whereby other offenses, not charged at all, are brought before the jury." Petition, p. 21.

This Court's attention is directed to the fact that the "other acts" which the prosecution brought before the jury at the trial of this case in order to show system and intent under La.R.S. 15:445-446 was the May

28 sale of marijuana and heroin to Agent Hebert. This sale occurred only one week after the date of the sale herein charged and was intimately connected to the crime herein charged, having the same locus and cast of characters. In fact, the May 21 and May 28 narcotic sales were part of one continuing transaction at Skinner's Motor Mart, covering a period of a few weeks and involving the three accused herein and the two undercover agents of the Louisiana Police who were working on the case, Ben Fullington and Russell Hebert. In the view of the State of Louisiana, evidence of the May 28 sale of marijuana and heroin would have been admissible as part of the res gestae at the trial of the instant case, as well as to show system and intent.

The State of Louisiana is of the respectful view that the trial judge's charge to the jury covering the law of conspiracy was correct and that it in no way prejudiced the accused herein.

CONCLUSION

No error having occurred during the trial of this case in the Louisiana courts, the State of Louisiana respectfully asks that this Honorable Court recall the Writ of Certiorari which was issued herein as improvidently granted and affirm the judgment of the Louisiana Supreme Court.

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CERTIFICATE

I, Jim Garrison, a member of the Bar of the Supreme Court of the United States, certify that a copy of this Brief has been sent to:

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New Orleans, Louisiana, this ____ day of August, 1968.

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